89-1844

NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD THOMAS McLENDON, PETITIONER

V.

CHARLES B. PETTEY, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS FOR THE

TWELFTH COURT OF APPEALS DISTRICT

OF TEXAS

APPENDIX

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PETITIONER, Pro Se

A P P E N D I X

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COURT OF APPEALS
Twelfth Court of Appeals District
306 County Courthouse
Tyler, Texas 75702

Notice (214)593-8471

FEBRUARY 23, 1989

JUDGMENT

12-87-00217-CV RICHARD THOMAS McLENDON V. CHARLES B. PETTEY - Cherokee County

THIS CAUSE came on to be heard on the transcript of the record, and the same being inspected, it is the opinion of the court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the Court below be in all things affirmed; that the Appellee, CHARLES B. PETTEY, recover of and from the appellant, RICHARD THOMAS McLENDON, and LAWYER'S SURETY CORPORATION, surety upon appellant's appeal bond, all costs in this behalf expended, both in this court

and the court below for all of which execution may issue, and that this decision be certified to the court below for observance.

Opinion by Justice Paul S. Colley.

NO. 12-87-00217-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

RICHARD THOMAS McLENDON, APPELLANT
vs.
CHARLES B. PETTEY, APPELLEE

APPEAL FROM THE 2ND JUDICIAL
DISTRICT COURT OF
CHEROKEE COUNTY, TEXAS

[O P I N I O N]

Charles B. Pettey, plaintiff/appellee, brought suit against Richard Thomas McLendon, defendant/appellant, seeking damages for personal injuries and injunctive relief. Following a jury trial, the court, based on the jury verdict, signed a judgment which awarded Pettey $5,000 actual damages and $5,000 exemplary damages and denied McLendon any relief on his counterclaim. We affirm.

McLendon present fourteen points of error, contending the trial court erred in (1) submitting Special Issue No. 1, (2) submitting Special Issue No. 3, (3) entering judgment on Special Issue No. 4, (4) submitting a damage issue including the element of "future physical pain and suffering" (Special Issue No. 6), (5) submitting an instruction with the exemplary damage issue (Special Issue No. 7) regarding attorney's fees and "litigation expenses," (6) this point merely restates points 1-4, inclusive, (7) this point merely restates points 1-6, inclusive, (8) overruling his motion to modify the judgment, and failing to award nominal damages to him for the trespass, (9) failing to offset the damages awarded to Pettey by the $2,500 exemplary damages awarded to him by the jury for Pettey's intentional trespass on his property, (10) this point restates

point of error no. 9, (11) failing to conduct an evidentiary hearing on his motion for new trial based on jury misconduct, (12) overruling his motion for new trial, and (13) in granting a permanent injunction. By his fourteenth point of error, McLendon claims the court abused its discretion in ordering the permanent injunction because (1) the order is overbroad and vague, (2) the order does not expressly recite the reasons justifying the injunction, and (3) there is no evidence, or insufficient evidence, to support the order.

The record reveals that the parties were long-time neighbors. Pettey resided on the west side of Cherry Street in Jacksonville, and McLendon lived on Kickapoo Street, but owned vacant land which was located on the east side of Cherry Street - opposite Pettey's home lot. According to Pettey, on

February 25, 1986, he went to McLendon's property to remove brush and a charred tree stump located on McLendon's property immediately opposite Pettey's driveway. According to Pettey's testimony, he observed that a stump was lying partially on the paved portion of Cherry Street. He testified that he decided to move the stump in order to be able to back his car out his driveway and proceed to the south on Cherry Street. He testified that after he had moved the stump northward approximately five feet, he heard McLendon shout, "Put it back or I'll shoot [you]." Pettey testified that he then attempted to run toward his house, "as much as I could."[1] When he reached

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[1]At the time, Pettey was 79 years of age and McLendon was approximately 77 years of age.

his driveway across the street, however, he was shot in the back. Pettey related that he had been struck by approximately seven or eight shots,[2] and that his car and window air conditioning unit on his home had been struck by other shots. He testified that he then entered his house and called the police.

Jacksonville Police Officer Mark Lee Johnson was dispatched to the scene of the shooting. Johnson testified that when he arrived at the address, he saw McLendon standing on his property opposite Pettey's home holding a 12-gauge shotgun in his hands. Johnson questioned McLendon, who informed him that he had shot Pettey, and that if Pettey came back on his land, he would shoot him again. Johnson also testified that he

[2]It is undisputed that McLendon fired a 12-gauge shotgun loaded with "no. 8 birdshot" on the occasion.

interviewed Pettey and observed "red" Marks on Pettey's wrist, elbow, and back "around the shoulders". Johnson described these marks as surface wounds, but stated that the skin "was broken". On cross-examination, Johnson recalled observing four "pellet marks" on Pettey's body. He explained that such as consistent with a situation in which a number eight birdshot load is fired from a 12-gauge shotgun from a distance of approximately fifty yards from the target. The clear implication of Johnson's testimony was that most of the small shots would have fallen short of a target 50 yards away from the muzzle of the gun.

Pettey further testified that he was shocked and upset immediately after the shooting. Pettey's daughter, Alice Rooks, testified with respect to Pettey's emotional state immediately following the

shooting. She had attempted to talk to her father about the incident. She stated that he would not talk about the shooting, but instead "buried his face in his hands and . . . wept". Rooks' testimony concerning Pettey's emotional state following the shooting was corroborated by the testimony of Pettey's brother, Jessie Pettey, and his wife, Ruth Pettey.

Dr. Jerry Landrum, a psychologist, was called to testify by Pettey. Landrum related that he had interviewed Pettey on March 7, 1986, April 18, 1987 and July 6 or 7, 1987. He stated that Pettey had psychological problems which stemmed from the shooting. He related that, in his opinion, Pettey was suffering from what he described to be "agitated depression" or "postraumatic stress syndrome". He stated that Pettey's emotional state had not "improved much" on April 18, 1987.

Dr. Landrum further testified that Pettey's condition during July of 1987 was much the same. He described Pettey as "jumpy" and "agitated", and stated that Pettey was afflicted with a chronic disorder and exhibited "severe emotional distress". Landrum also stated that it was highly probable that Pettey would require inpatient (institutional) psychiatric treatment. Landrum estimated that such institutional care would be required for a period of approximately two years, at a cost of $12,000.

Pettey called McLendon as a witness under the adverse party rule. McLendon admitted to firing the shotgun on the occasion in question, but vehemently declared that before he shot, "I [hollered] at him, I said, Mr. Pettey, put the stump down where it is." McLendon likewise testified: "I didn't shoot Mr. Pettey. I shot the ground

between me and him a 103 long steps from me"; "I didn't know anything hit him. I didn't intend to hit him." McLendon also denied that he had told Officer Johnson, "[he was] going to shoot [Pettey] if he came onto [McLendon's property]." McLendon later testified that he had merely fired what he termed a "warning shot" upon Pettey's refusal to drop the tree stump.

The court in its charge to the jury submitted fourteen special issues. In response thereto, the jury found that (1) McLendon shot Pettey, (2) the shooting was a proximate cause of injuries to Pettey, (3) McLendon either intentionally, knowingly or recklessly caused bodily injury to Pettey, (4) on the occasion McLendon was guilty of gross

negligence,[3] (5) the gross negligence "proximately caused the occurrence in question," (6) Pettey sustained actual damages from his injuries in the amount of $5,000, (7) Pettey should be awarded $5,000 in punitive damages, (8) pettey was shot while on McLendon's property, (10) on the occasion, Pettey intentionally trespassed on McLendon's property, (11) McLendon sustained no monetary damages as a result of the trespass, (12) McLendon suffered "Mental anguish" as a result of Pettey's trespass, (14) McLendon should be awarded $2,500 in punitive damages for Pettey's intentional trespass. In response to Special Issue No. 9, the jury refused to find that Pettey possessed a right

[3]Defined by the court as conduct showing an "entire want of care...[amounting to] conscious indifference to the rights, welfare or safety of [others]."

(license) to enter upon McLendon's property. In response to Special Issue No. 13, the jury refused to find that McLendon sustained any actual damages resulting from the "mental anguish" produced by Pettey's intentional trespass.

Based on the special verdict, the court signed a judgment on August 20, 1987, which awarded Pettey money damages in the amount of $10,000 and ordered a permanent injunction to issue which enjoined McLendon from:

> (1) Intentionally, knowingly, or recklessly causing bodily injury to the Plaintiff, the Plaintiff's wife, or to any other person at the Plaintiff's home which is located at 419 Cherry Street in Jacksonville, Cherokee County, Texas;
>
> (2) Intentionally, knowingly, or recklessly shooting the Plaintiff, the Plaintiff's wife, or any other person at the Plaintiff's home which is located at 419 Cherry Street in Jacksonville, Cherokee County, Texas;

(3) Threatening the Plaintiff, the Plaintiff's wife, or any other person at the Plaintiff's home which is located at 419 Cherry Street in Jacksonville, Cherokee County, Texas.

Under his first point of error, McLendon argues that the form of Special Issue No. 1 was defective because no definition of negligence accompanied the issue and because the issue was duplicitous. He further asserts that the issue constitutes a comment on the weight of the evidence. The issue reads, "Do you find that on the occasion in question, [McLendon] did shoot [Pettey]?" McLendon mad no objection at trial that the issue was a comment on the weight of the evidence, and to that extend the point is not preserved for review. McLendon's complaint that the issue was defective because it was duplicitous, and because it was not accompanied by a proper definition of negligence, is

patently unmeritorious. The point of error is overruled.

Since we are persuaded that the liability aspect of the judgment for Pettey is supported by the jury's findings in response to Special Issues 1, 4 and 5, we pretermit any discussion of McLendon's point of error no. 2, as it is immaterial.

By his third point of error, McLendon claims that the jury's response to Special issue No. 4, that he was "grossly negligent [in firing the shotgun]" on the occasion in question, will not support the judgment in the absence of a jury finding that he was guilty of "simple negligence" in so doing. McLendon's arguments under this point assume that he made an objection at trial to the submission of Special Issue No. 4. The record reflects that McLendon made no objection to the form of the

issue at trial. The issue and its accompanying definition read:

> SPECIAL ISSUE NO. 4
>
> DO YOU FIND THAT THE DEFENDANT WAS GROSSLY NEGLIGENT ON THE OCCASION IN QUESTION?
>
> 'Grossly Negligent' means more than momentary thoughtlessness, inadvertence or error of Judgment. It means such an entire want of care as to indicate the the act or omission in question was the result of conscious indifference to the rights, welfare or safety of the person or property affected by it.

McLendon did not properly brief this point. He cites no case authority which might even arguably support his position - that a finding of gross negligence must be predicated on a finding of ordinary negligence. Unfortunately, Pettey does not address the issue in his brief, but urges us to conclude that the trial judge "will be deemed to have found [the omitted finding of negligence] . . . if there is evidence

to support such a finding.[4] Rule 279, Texas Rules of Civil Procedure."

Nevertheless, in the interest of justice, we will address and decide the fundamental question raised by the point. We note that "gross negligence" is negligence of a degree higher than that of "ordinary negligence". Otherwise stated, gross negligence presents conduct is measured by the facts of the case and circumstances under which the conduct occurred. Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1, 175 S.W.2d 249 (1943). Ordinary negligence is defined as a failure to exercise that degree of care which a person of ordinary prudence would have exercised when confronted with the same or similar circumstances. Id.

[4]As in circumstances where no objection was made to the absence of the issue in the charge. Hawes v. Central Texas Production Credit Ass'n, 503 S.W.2d 234, 236 (Tex. 1973)

Gross negligence has been recently defined by the Texas Supreme Court in Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981), to mean "more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to indicate that the act . . . in question was the result of conscious indifference to the rights, welfare, or safety of the persons affected by it." Id. at 920. The very definitions of negligence and gross negligence conclusively refute any claim that a finding of the existence of ordinary negligence must precede a finding of gross negligence for the identical conduct. McLendon's third point of error is overruled.

McLendon alleges by his fourth point of error that the court erred (1) in submitting in Pettey's damage issue (Special Issue No. 6) the elements of

"future physical pain and suffering," and (2) in "entering judgment on the actual-damage verdict . . . ." because there is no evidence to support a finding of "future physical pain and suffering". Our examination of the record reveals that McLendon made no objection to the submission of the issue, filed no motion to disregard the finding, filed no motion for judgment n.o.v., filed no motion to modify or reform the judgment, nor made any allegation in his motion for new trial that the finding of the jury has no support in the evidence. Hence, the point is not preserved for review and is overruled.

By his fifth point of error, McLendon presents another "no evidence" point regarding the jury's answer to Special Issue No. 7. For the very same reasons set forth above in our discussion of McLendon's fourth point of error, we

likewise overrule his fifth point of error.

Points of error six and seven, which merely restate and reargue points of error nos. 1-6, are without merit and are therefore overruled.

By his eighth point of error, McLendon claims that the court erred in overruling his amended motion to modify the judgment so as to award him nominal damages for Pettey's intentional trespass. Under his point of error nos. 9 and 10, McLendon asserts that the court erred in overruling his amended motion to modify the judgment so as to grant him the sum of $2,500 in punitive damages. McLendon also argues under these points that (1) an award of nominal damages will support an award of punitive damages, and (2) punitive damages for intentional trespass are recoverable without an award of actual damages, nominal or otherwise.

In support of these arguments, McLendon refers us to Flanagan v. Womack and Perry, 54 Tex. 45 (1880). In Flanagan, the plaintiff brought suit against Womack and Perry for assault and battery. At trial, the trial judge instructed a verdict for Perry, but "a verdict and judgment of one dollar actual damages" was granted Flanagan against Womack. (Emphasis added).

In defense of the suit, Womack alleged that he had been convicted in a criminal proceeding for the assault, and had paid a $100 fine. Flanagan's demurrer to that pleading was overruled, and proof of the criminal conviction was allowed. The jury, however, was instructed to consider the conviction "in mitigation but no in bar of [Flanagan's] claim for exemplary damages."

Flanagan appealed, alleging, inter alia, that the court erred in overruling

his demurrer and in overruling his objection to that part of the court's charge whereby the jury "were instructed that exemplary damages could not be recovered without proof of actual or compensatory damages . . . ." Id. at 50. (Emphasis added). The Flanagan court held that the court did not err in overruling the demurrer, and that the instruction given by the trial court was correct. The court noted that the jury had found Flanagan entitled to $1.00 actual damages, and concluded that even if the "charge as an abstract proposition [was] incorrect, it could not have prejudiced [Flanagan]." Id. at 51. Flanagan, however, contains dictum stating the following:

> It is a general rule, that for every unlawful trespass the injured party is entitled to at least nominal damages. Certainly this should be so if the trespass was of such character as to authorize exemplary damages. This nominal damage would

> be the measure of the actual damage if not other is shown, and must necessarily arise in every case in which exemplary damages could be given.

Id. at 51

Such dictum does state that damages, though labeled nominal, may, in some cases, constitute actual damages and therefore may support punitive damages. That pronouncement has been clearly rejected in subsequent decisions rendered by our Supreme Court. E.g., Nabours v. Longview Savings & Loan Association, 700 S.W.2d 901, 904 (Tex. 1985); Doubleday & Co., Inc. v. Rogers, 674 S.W.2d 751, 753-754 (Tex. 1984); City Products Corp. v. Berman, 610 S.W.2d 446, 450 (Tex. 1980); and Wright v. Gifford-Hill & Co., Inc., 725 S.W.2d 712, 714 (Tex. 1987). Upon the authority of the above-cited cases, we overrule points of errors nos. 9 and 10.

McLendon, by the allegations of his original counterclaim, sought to recover compensatory or actual damages (1) for injury to his land and (2) for mental anguish based on Pettey's "willful, intentional, and malicious" trespass on his property. The jury found that Pettey "willfully and intentionally trespassed" on McLendon's property, but in response to Special Issue No. 11, refused to find that Pettey's trespass on the occasion in question "caused damage to the premises of [McLendon]."[5]

Although we conclude that the trial court erred in overruling McLendon's amended motion to modify the judgment by awarding him nominal damages for the

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[5]McLendon did not preserve, and does not assert for review by this court, a point of error alleging that the jury's negative answer to Special Issue No. 11 is contrary to the great weight and preponderance of the evidence.

trespass in the sum of $1.00, we are persuaded that such error did not amount to a substantial denial of McLendon's rights, such as "was reasonably calculated to cause . . . rendition of an improper judgment in the case or . . ." constitute an error that "probably prevented [McLendon] from making a proper presentation of [his] case" to this court. See Tex. R. App. P. 81(b)(1). Therefore, we overrule his eighth point of error.

McLendon, by his eleventh and twelfth points of error, complains of the trial judge's alleged failure to conduct an evidentiary hearing on his motion for new trial and grant him a new trial based on jury misconduct. The record reflects that McLendon's amended motion for new trial was overruled by operation of law. The record is devoid of any showing that the trial judge refused to set the motion

down for hearing and determination.[6] Furthermore, contrary to McLendon's contention, the trial court did in fact conduct a hearing on August 20, 1987, on the alleged jury misconduct upon consideration of McLendon's motion for judgment. The trial court overruled McLendon's motion for mistrial, which was based on the alleged misconduct of an unnamed juror as stated in the affidavit of Venice M. McLendon, wife of appellant. Points of error nos. 11 and 12 are without merit and are overruled.

By his thirteenth and fourteenth points of error, McLendon attacks the order for permanent injunction, claiming that (1) Pettey came to court with

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[6]Aside from the original affidavit of attorney Kurt Noell, former counsel for McLendon. The affidavit, attached to McLendon's appellate brief, is not a part of the record in this case and we may not consider it for any purpose in this appeal.

"unclean hands" and should not be granted equitable injunctive relief, (2) the order for the writ of injunction is overbroad, (3) the order contains no language stating the reasons justify the issuance of the writ as required by Tex. R. Civ. P. 683, and that (4) no evidence was presented and made any threats directed either toward Pettey or toward any member of Pettey's family.

The jury in this case found that Pettey committed a deliberate trespass on McLendon's property, and that McLendon shot Pettey while Pettey was on McLendon's property. According to that verdict, while Pettey's act was unlawful, McLendon's act was likewise unlawful. In our opinion, McLendon's criminal act, standing alone, forms a sufficient basis for the trial court's order for the permanent injunction, limited as it is,

to protect Pettey and his family from unlawful intrusions on their property. It is an ancient and venerable rule that a court of equity may restrain one from the commission of a crime where property rights are concerned. Ex parte Allison, 48 Tex. Cr. R. 634, 90 S.W. 492 (1905). Also, it is the court, not the jury, who determines "the expediency, necessity, or propriety of equitable relief." State v. Texas Pet Foods, Inc., 591 S.W.2d 800, 803 (Tex. 1979) (citation omitted).

As to McLendon's argument that the court should not have ordered the injunction because Pettey came into court with "unclean hands", we need only observe that no dispute or difference between wrongdoers is being "adjusted" or decided by the issuance of the writ of injunction. Humphreys-Mexia Co. v. Arseneaux, 116 Tex. 603, 297 S.W. 225,

231 (1927), has no application here. The injunction ordered in no way favorably sanctions future trespasses by Pettey on McLendon's property, but merely enjoins McLendon from committing penal offenses against Pettey, his wife, and his family on Pettey's property. We are of the opinion that the trial court did not err, nor did it abuse its judicial discretion, in ordering the permanent injunction. McLendon's points of error nos. 13 and 14 are overruled.

McLendon filed a presubmission motion to file certain original exhibits, viz., photographs, medical records, shotgun, birdshot, and a spent shotgun shell or casing. Pettey filed a presubmission motion for "damages for delay" under Tex. R. App. P. 84. Both motions were passed for consideration on

the merits of the cause. We now overrule both motions.

The judgment is affirmed.

PAUL S. COLLEY
Justice

Opinion delivered February 23, 1989.

NO. 12-87-00217-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

RICHARD THOMAS McLENDON, APPELLANT
vs.
CHARLES B. PETTEY, APPELLEE

APPEAL FROM THE 2ND
JUDICIAL DISTRICT COURT
OF CHEROKEE COUNTY, TEXAS

[O P I N I O N]

ON MOTION FOR REHEARING

Appellant presents seven points of error by his motion for rehearing. Under his sixth point of error, he correctly argues that we erroneously concluded that he did not preserve for review the error alleged in his original fourth point of error. By that point of error, appellant claimed the trial court erred in submitting, as a part of the damage issue

(Special Issue No. 6), the element of "future physical pain and suffering" since there was no evidence to support the submission of that element. Appellant did make a timely and proper objection to the submission of that element of damage. Thus, we now address the merits of his original point of error number 4.

In determining a no evidence point, we consider only the evidence and reasonable inferences arising therefrom which tend to support the submission of that element of damage. The evidence reflects that the pellets which were fired from the shotgun struck Pettey in several places on his body, breaking the skin and causing inflammation - "red marks". It is clearly shown, however, that Pettey suffered no serious bodily injury as a result of the shooting incident. Indeed, most of the evidence

produced by Pettey at trial related to the mental anguish and suffering sustained by him. The shooting occurred on February 25, 1986, and the charge was submitted to the jury on July 14, 1987. The record contains no evidence tending to prove that Pettey would suffer physical pain during some period of time after July 14, 1987. The trial court therefore erred in submitting that element of damage. Accordingly, we sustain appellant's fourth point of error. We must next determine whether the error requires reversal of the judgment. Tex. R. App. P. 81(b)(1).

Special Issue No. 6 and the jury's answer thereto read:

> WHAT SUM OF MONEY, IF ANY, IF PAID NOW IN CASH, WOULD REASONABLY COMPENSATE CHARLES B. PETTEY FOR HIS INJURIES, IF ANY, WHICH HE HAS SUSTAINED AS A RESULT OF THE OCCURRENCE IN QUESTION? In answering this Special Issue, consider the following elements of damage and no others:

1. PAST PHYSICAL PAIN, SUFFERING AND MENTAL ANGUISH;

2. MEDICAL, DOCTOR, AND PSYCHOLOGICAL BILLS INCURRED IN THE PAST;

3. PHYSICAL PAIN, SUFFERING AND MENTAL ANGUISH THAT THE PLAINTIFF WILL, IN ALL REASONABLE MEDICAL PROBABILITY, SUFFER IN THE FUTURE;

4. PSYCHOLOGICAL BILLS WHICH THE PLAINTIFF WILL, IN ALL REASONABLE PROBABILITY, INCUR IN THE FUTURE;

5. EMOTIONAL DISTRESS AND TRAUMA SUFFERED IN THE PAST;

6. EMOTIONAL DISTRESS WHICH THE PLAINTIFF WILL, IN ALL REASONABLE MEDICAL PROBABILITY, SUFFER IN THE FUTURE;

ANSWER IN DOLLARS AND CENTS, IF ANY.

ANSWER: $5,000.00

Due to the form of the damage issue, we are unable to determine the specific amount of money, if any, which the jury awarded to Pettey for future physical pain and suffering. Further still, since Dr. Landrum testified that

Pettey would require institutional psychiatric care for two years at a cost of $12,000, and the jury awarded Pettey actual damages in the sum of only $5,000, we conclude that the error is harmless under the analysis provided for by Tex. R. App. P. 81(b)(1).

Having carefully considered the remaining six points of error alleged in the appellant's motion for rehearing, we find them to be without merit. The motion for rehearing is overruled.

PAUL S. COLLEY
Justice

Opinion delivered May 12, 1989.

IN THE SUPREME COURT OF TEXAS

CAUSE NO. C-8768

RICHARD THOMAS McLENDON, PETITIONER
vs.
CHARLES B. PETTEY, RESPONDENT

FROM THE 12TH COURT OF APPEALS
TYLER, TEXAS

MOTION FOR REHEARING

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PETITIONER'S POINTS OF ERROR

POINT OF ERROR NUMBER ONE

THE COURT OF APPEALS ERRED IN FAILING TO DETERMINE THAT THE ORDER OF SEPTEMBER 20, 1988 IS VOID AND WITHOUT ANY STATUTORY AUTHORITY.

(Germane to Court of Appeals Per Curiam, Opinion Dated December 30, 1988 and Court of Appeals Order Dated February 17, 1989)

POINT OF ERROR NUMBER TWO

THE COURT OF APPEALS ERRED IN NOT PERMITTING AN ADEQUATE PRESENTATION OF THE MERITS OF THE APPEAL.

(Germane to the Court's Overruling Without Opinion the Motion to Set Aside the September 20, 1988 Order and the Motion to Rescind Court of Appeals Orders dated October 20, 1988 and November 17, 1988)

POINT OF ERROR NUMBER THREE

THE COURT OF APPEALS ERRED IN OVERRULING THE MOTIONS TO RECUSE CHIEF JUSTICE SUMMERS.

(Germane to Court of Appeals Order Dated December 8, 1988 Overruling Recusal as to Appeal and Order Dated January 12, 1989, Dismissing Motion for Recusal Pertaining to Mandamus as Moot)

POINT OF ERROR NUMBER FOUR

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE LIABILITY ASPECT OF THE JUDGMENT

FOR PETTEY IS SUPPORTED BY THE JURY'S FINDINGS.

(Germane to Court of Appeals Opinion, Page 6)
(T. 46-50)

POINT OF ERROR NUMBER FIVE

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE MOTION FOR MISTRIAL ON THE BASIS OF JURY MISCONDUCT.

(Germane to Court of Appeals Opinion, Page 11).
(T. 89, S.F. [Hearing August 20, 1987] 6-8)

POINT OF ERROR NUMBER SIX

THE COURT OF APPEALS ERRED IN CONCLUDING THAT ALTHOUGH McLENDON HAD PRESERVED ERROR CONCERNING THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE JURY'S CONSIDERATION OF FUTURE PHYSICAL PAIN AND SUFFERING, ERROR WAS HARMLESS.

(Germane to Court of Appeals Opinion, Page 8 and Supplemental Opinion on Rehearing, Page 3)
(T. 51)

POINT OF ERROR NUMBER SEVEN

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE TRIAL COURT CORRECTLY GRANTED A PERMANENT INJUNCTION AGAINST McLENDON.

(Germane to Court of Appeals Opinion, Page 11).
(T. 82-83)

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Decker v. Kirlicks, 110 Tex. 90, 216 S.W.2d 385 (1919)

Electronic Data Systems Corp. v. Powell, 524 S.W.2d 393 (Tex.Civ.App. - Dallas 1975, writ ref'd n.r.e.)

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Eubanks v. Hand, 578 S.W.2d 515 (Tex.Civ.App. - Corpus Christi 1979, writ ref'd n.r.e.)

Fry v. Tucker, 146 Tex. 18, 202 S.W.2d 218 (1947)

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Garcia v. Kelly, 565 S.W.2d 112 (Tex.Civ.App. - Corpus Christi 1978, n.w.h.)

General Homes, Inc. v. Wingate Civic Association, 616 S.W.2d 351 (Tex.Civ.App. - Houston [14th Dist.] 1981, writ ref'd)

Gipson v. Southwest Oil Co. of San Antonio, 604 S.W.2d 396 (Tex.Civ.App. - Tyler 1980, n.r.h.)

Green v. Meadows, 517 S.W.2d 799 (Tex.Civ.App. - Houston [1st Dist.] 1984), rev'd on other grounds, 524 s.W.2d 509 (Tex. 1975) (per curiam)

Harker v. Coastal Engineering Inc., 672 S.W.2d 517 (Tex.App. - Corpus Christi 1984, writ ref'd n.r.e.)

Hartt v. Yturia Cattle Co., 228 S.W. 551 (1921)

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Hensley v. Salinas, 538 S.W.2d 617 (Tex. 1979)

Hogue v. City of Bowie, 209 S.W.2d 807 (Tex.Civ.App. - Fort Worth 1948, writ ref'd n.r.e.)

Holt v. City of San Antonio, 547 S.W.2d 715 (Tex.Civ.App. - San Antonio 1977, writ ref'd n.r.e.)

Humphreys-Mexia Co. v. Arseneaux, 197 S.W.2d 225 (Tex. 1927)

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O'Neal v. County of San Saba, 594 S.W.2d 185 (Tex.Civ.App. - Austin 1985, writ ref'd n.r.e.)

Pirtle v. Gregory, 629 S.W.2d 919 (Tex. 1982)

Raine v. Searles, 302 S.W.2d 486 (Tex.Civ.App. - El Paso 1957, n.w.h.)

Ramon v. Chavira, 586 S.W.2d 594 (Tex.Civ.App. - 1977, no writ)

Reese v. Brittan, 570 S.W.2d 528 (Tex.Civ.App. - Amarillo 1978, writ ref'd n.r.e.)

Rowland v. City of Corpus Christi, 620 S.W.2d 930 (Tex.Civ.App. - Corpus Christi 1981, writ ref'd n.r.e.)

Sanchez v. Sanchez, 609 S.W.2d 307 (Tex.Civ.App. - El Paso 1980, n.w.h.)

Schaefer v. Texas Employer's Ins. Ass'n, 612 S.W.2d 199 (Tex. 1981)

Shapley v. Texas Department of Human Resources, 581 S.W.2d 210, 253 (Tex.Civ.App. - El Paso 1979, no writ)

Smith v. Bidwell, 619 S.W.2d 445 (Tex.Civ.App. - Corpus Christi 1981, writ ref'd n.r.e.)

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State v. Texas Pet Foods, Inc., 591 S.W.2d 800 (Tex. 1979)

Strange v. Treasure City, 608 S.W.2d 604 (Tex. 1980)

Sun Oil Company v. Whitaker, 483 S.W.2d 808 (Tex. 1972)

Suttle v. State, 457 S.W.2d 344 (Tex.Civ.App. - Waco 1980, n.w.h.)

Templeton v. Giddings, 12 S.W. 851 (Tex. 1889)

Rule 55(a), T.R.A.P

Rule 84, T.R.A.P

Rule 90(a)

Texas Government Code

Section 22.001(a)(2)

Section 22.001(a)(3)

Section 22.001(a)(6)

Canons of Judicial Conduct

Canon 3(C)(1), Code of Judicial Conduct

Texas Constitution

Article V, Section 11

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IN THE SUPREME COURT OF TEXAS

CAUSE NO. C-8768

RICHARD THOMAS McLENDON, PETITIONER
vs.
CHARLES B. PETTEY, RESPONDENT

FROM THE 12TH COURT OF APPEALS
TYLER, TEXAS

MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

NOW COMES RICHARD THOMAS McLENDON, Petitioner herein, and submits this his Motion for Rehearing. For ease of identification, the parties will be referred to as "McLendon" and "Pettey". McLendon was the Defendant in the trial court ad the Appellant in the Twelfth court of Appeals below. The judgment of the trial court was affirmed by the court

of appeals. For cause of action, McLendon would show the Court the following:

I. RESUBMISSION OF JURISDICTION

This Court has jurisdiction to consider the errors raised in McLendon's application for writ of error by virtue of the authority conferred upon the Court by provisions contained in the Texas Government Code, Section 22.001(a), subsections (2), (3), and (6).

II.

On October 4, 1989, this court denied McLendon's application for writ of error in this cause.

III.

McLendon respectfully submits that this Court erred in grounding its order upon the following notation on the application for writ of error "Writ Denied", in that the points of error brought forward in the application

involve fundamental issues of jurisdiction and a litigant's constitutional rights to have his case tried by a fair and impartial tribunal, to appeal, and to be accorded due process of law.

IV.

Subsection 22.001(a)(6) confers jurisdiction on this court in cases in which it appears that an error of law has been committed by the court of appeals and the error is of such importance to the jurisprudence of the state that, in the opinion of the Supreme Court, it requires correction.

Subsection 6 was amended in 1987. Recognizing the need for clarification of this extremely significant subsection of the Code, Professor William V. Dorsaneo III notes in his Texas Litigation Guide the similarities between the present provision and a prior version of the law:

"Although the proper construction to be given the 1987 amendments depends on future decisions of the Texas Supreme Court, it should be noted that a former version of the statutory predecessor of Subsection 22.001(a)(6) contained similar language. Prior to 1927, the last provision of the Court's jurisdictional statute provided for jurisdiction of 'any other case in which it is made to appear that an error of law has been committed by the Court of Civil Appeals of such important to the jurisprudence of the State as in the opinion of the Supreme Court requires correction . . .' [former R.C.S. Art. 1728(6) - Act of 1917). This provision received judicial construction in Decker v. Kirlicks [110 Tex. 90, 216 S.W.2d 385, 386-387 (1919); see also Hartt v. Yturia Cattle Co., 228 S.W. 551, 554 (1921); National Compress Co. v. Hamlin, 269 S.W. 1024, 1028 (1925) - describing jurisdiction as extending to prevention of 'defeat of substantial rights of parties under fundamental principles'] as follows:

> 'Whether the Court of Civil Appeals has erroneously declared the substantive law of the case is no longer the test as applied to cases falling within the subdivision. The amendment declares, in effect that it is not enough that the error of law . . . be of importance

> to the aggrieved party; nor that its correction be necessary in the view of the Supreme Court to prevent an injustice in the immediate case; nor even that it be of important to the jurisprudence of the State. For the Supreme Court to be invested with the power to revise the ruling, it is required that it amount to an error of law 'of such important' to the jurisprudence of the State as in the opinion of the court requires correction. This clearly presupposes a ruling of such erroneous consequence as, if permitted to stand, would constitute a serious departure from the established law or introduce a doctrine violative of fundamental principles."
> (§152.01[4][a], pp. 152-12 - 152-12.1.)

V.

The primary and ultimately controlling issue raised in the instant cause is one of utmost importance to the practice of law and the orderly administration of justice -- specifically

a litigant's right to adequate judicial review of the record on appeal. In most cases, as in this one, an accurate and complete statement of facts is absolutely essential to the proper presentation of the case on appeal. When deprived of a true and correct statement of facts, the litigant is unable to bring forward his claims fully and adequately on appeal; when essential evidence is either lacking or significantly altered, he is effectively denied a reasonable opportunity to prove his case. Such are the circumstances in which McLendon is presently placed.

The right to appeal is a right inherently invested by virtue of both the Texas Constitution and the United States Constitution, and interference with that right deprives a litigant of due process of law. The circumstances of the pending lawsuit indicate without any question

that true fundamental error exists which requires correction. "Fundamental error" has been defined by this Court in Pirtle v. Gregory, 629 S.W.2d 919 (Tex. 1982) as including those instances in which the record shows that the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas.

At the heart of the instant controversy is an order of the trial court dated September 20, 1988 which assesses an additional judgment against McLendon (above and beyond that which was assessed in the original judgment dated August 20, 1987) and which also purports to validate the statement of facts in this case. The order is void on its face as matter of law, under Rule 329b T.R.C.P. insofar as the trial court lacked jurisdiction to issue same because

its plenary power had expired long before the order was signed. (The original, final judgment appears in the Transcript on pages 82-83; the void additional judgment appears in the Supplemental Transcript on pages 95-97).

The question of jurisdiction constitutes fundamental error and may be raised at any time. Tullos v. Eaton Corp., 695 S.W.2d 568 (Tex. 1985). The issue was first raised in a Motion to Vacate Order Affecting Judgment filed in the trial court on October 7, 1988, and more recently in the Motion for Rehearing filed in the court of appeals on March 10, 1989.

With regard to the question of whether the issues presented herein require correction, it is clear that fundamental errors appear. As will be shown, there were other actions by the trial court and the court of appeals

which are erroneous as a matter of law or erroneous abuses of discretion sufficiently grave so as to require correction.

VI.

The basic question posed is whether a district judge has the right to perform the specific functions or to take the specific actions listed below:

1. Adjuge the merits of a complaint alleging willful and deliberate falsification of official records, tampering with evidence, and other wrongful acts calculated to conceal the salient judicial errors requiring reversal of his prior judgment in a case when his own reputation and career are at stake.

2. Impose excessive and unreasonable restrictions on discovery [specifically regarding discovery of the court reporter's audio tape recordings and stenographic notes] which effectively prevent the proper and necessary discovery of evidence to prove the official court reporter's statement of facts had been falsified in a case appealed from his court.

3. Require the party complaining of a falsified statement of facts to present his case severely debilitated by the lack of discovery, in a hearing ordered by the court of appeals pursuant to Rule 55(a), T.R.A.P.

4. Take unprecedented punitive action by assessing an additional judgment against the complaining party in the absence of any legal authority and when the trial court lacked the requisite jurisdiction because the court's plenary power over its original judgment had expired.

The next question posed is whether the court of appeals has the right to take the actions enumerated below:

1. Overrule a proper motion to direct the court reporter to prepare a new statement of facts in conformity with the relevant rules of civil and appellate procedure on the basis that the issues raised in the motion had been "settled" by an order of the trial court which is void on its face.

2. Deny leave to file an amended or supplemental brief on the same grounds.

3. Overrule a proper motion to recuse when the impartiality of the Chief Justice of the court

of appeals has been reasonably questioned by virtue of his close, personal friendship with the trial judge, who was placed in direct adversarial alignment against the Appellant (now Petitioner) in the controversy surrounding the statement of facts.

4. Deny leave to file a petition for writ of mandamus seeking to set aside the trial court's void additional judgment.

5. Overrule without commend a motion to set aside the trial court's void additional judgment when the reason given for denying mandamus relief, in a previous ancillary action, was that the Appellant/Petitioner had an adequate remedy by way of the appeal of the case in chief then pending before the court of appeals.

6. Overrule without commend a proper motion to rescind the orders of the court of appeals which were predicated upon the trial court's void additional judgment.

7. Proceed to render its decision and to issue its judgment and opinion in the case when the overriding issue of the falsified statement of facts has never been resolved or clearly settled in a proper fashion.

8. Refuse to address any of the issues outlined above in either the original opinion of the court or the opinion issued on motion for rehearing in violation of Rule 90(a), T.R.A.P., which imposes upon the court a mandatory duty to address all issues raised and necessary to final disposition of the appeal.

The actions of both the trial court the court of appeals respecting these crucial issues are reasonably calculated no only to deprive McLendon of his rights and to prevent the proper presentation of the case on appeal, but also to preclude any future civil action by McLendon for the recovery of damages and to protect the trial judge and other individuals involved from public exposure. Such actions (discussed with greater particularity under Points of Error Nos. One, Two, and Three below) constitute fundamental error compounded by procedural errors and erroneous abuses of discretion which cannot help but produce

injurious effects, not only in the instant cause, but also in the overall fabric of Texas jurisprudence.

VII.

The significant failure of the court of appeals to adhere to Rule 90(a), T.R.A.P., when issuing its opinions in this case, poses a serious problem. Absent are any meaningful statements with respect to that court's findings or reasoning which prompted its decision to summarily overrule certain essential points of error without comment. As this court noted in Lujan v. Houston General Ins. Co., 756 S.W.2d 295 (Tex. 1988), the requirements of Rule 90(a) are quite specific.

> "Texas Rule of Appellate Procedure 90(a) mandates that the 'court of appeals shall hand down a written opinion which . . . shall address every issue raised and necessary to final disposition of the appeal.' Since the court of appeals in this case sustained all the insurance carrier's points to reverse and

> render, the points sustained were apparently 'necessary to [a] final disposition of the appeal.'
>
> . . .
>
> We agree with the Lujans that Rule 90 does not permit a court of appeals to sustain points which are dispositive of the case without revealing its reasoning." Id. at 296.

The reverse may be equally damaging to a litigant. It is incomprehensible that the court of appeals could determine the case on the merits without any discussion whatsoever as to either McLendon's allegations concerning the falsified statement of facts or the trial court's void order of September 20, 1988, which purports to validate the statement of facts. Those are the pivotal issues upon which the appeal is predicated. All of the remaining points of error presented could be overruled and yet the entire cause be reversed and remanded on the basis of the two issues, or either of

them. Clearly, a full appellate review mandates that the court address the issues. The failure or refusal to address them constitutes a flagrant violation of Rule 90(a) and requires reversal, or at the very least a construction of the rule by this Court.

Furthermore, as Professor William V. Dorsaneo III has indicated, some further expression by this Court as to the construction which should be placed on Subsection 22.001(a)(6), Texas Government Code, is truly needed. The instant cause presents precisely the proper medium for addressing the questions of what constitutes an error of such importance to the jurisprudence of the state that it requires correction and whether the Court intends to apply a definition of fundamental error.

VIII.

This court further has jurisdiction under Subsection (2) in that the opinion of the court of appeals conflicts with prior decisions of other courts of appeals and this Court. These conflicts exist specifically with regard to the portions of the opinion relating to jury misconduct and the entry of a permanent injunction. All of the pertinent conflicting decisions are included in the appropriate points of error.

IX. POINT OF ERROR NUMBER ONE

THE COURT OF APPEALS ERRED IN FAILING TO DETERMINE THAT THE ORDER OF SEPTEMBER 20, 1988 IS VOID AND WITHOUT ANY STATUTORY AUTHORITY.

(Germane to Court of Appeals Per Curium Opinion Dated December 30, 1988 and Court of Appeals Order Dated February 17, 1989)

The court of appeals overruled a Motion for Leave to File Petition for Writ of Mandamus tendered by McLendon in an ancillary action herein seeking to set aside the void order of the trial court

dated September 20, 1988. In a per curium opinion, that court concluded that Relator/Petitioner had an adequate remedy by appeal which would preclude issuance of a write of mandamus. On February 17, 1989, the court of appeals overruled without commend McLendon's motion for rehearing of two motions: a motion to set aside the trial court's order affecting judgment (i.e., the order of September 20, 1988), as well as a motion to rescind orders based upon the trial court's void order. On February 23, 1989, the court issued its judgment and opinion affirming the judgment of the trial court dated August 20, 1987. The opinion contains no mention of the trial court's additional judgment order dated September 20, 1988. It must be noted that the original brief filed by McLendon in the court of appeals did not refer to the Rule 55(a) hearing or the September

20, 1988 order for the obvious reason that the hearing was not conducted and the order was not signed until after the brief had been filed. A motion for leave to file an amended or supplemental brief was filed on November 16, 1988 and denied on November 17, 1988. The failure of the court of appeals to address the issues of the falsified statement of facts and the void order of September 20th was called to that court's attention in the Motion for Rehearing. The subsequent opinion of the court merely overruled the point of error with no comment.

A. Factual Overview

McLendon has contended and pursued a rigorous course of action to establish that an inaccurate and falsified statement of facts was prepared and submitted in this cause. In an attempt to obtain a correct record, McLendon filed in the court of appeals a motion to

direct the court reporter to prepare a new statement of facts in conformity with the rules. (Supp. T. 5). On August 31, 1988, the court of appeals issued an order directing the trial court to conduct a hearing on the issue pursuant to Rule 55(a), T.R.A.P. (Supp. T. 3). Subsequently, McLendon filed in the trial court a motion to produce, setting forth clearly and specifically the items sought for review. (Supp. T. 38). On September 13, 1988, the trial court entered an order ostensibly granting the motion to produce. An order requested by McLendon (Supp. T. 54) and providing for the specific means of copying, duplicating and/or transcribing the original documents was refused by the trial court. That order appears directly behind Relator's Exhibit 4 in the mandamus proceedings. Relator's Exhibit 5 is an affidavit (also appearing at Supp. T. 61)

executed by Petitioner's son, Gordon David McLendon, which reflects a conversation which he had with Judge Morris Hassell concerning the procedure to be utilized for reviewing the original stenographic notes and audio tapes. According to the affidavit, the following restrictions were imposed on the discovery process:

(1) Only McLendon or an attorney employed by him would be permitted to review or inspect the court records. All other persons, including any agent of McLendon who was not an attorney and any certified shorthand reporter selected by McLendon, were specifically forbidden to assist in the discovery process. Affidavits are contained in the record reflecting the ill health and advanced age of Mclendon and his inability to employ counsel due to the nature of the allegations made.

(2) None of the materials specified in the motion to produce would be permitted to be copied, photographed, re-recorded, reproduced or duplicated. No one would be permitted to record stenographically any of

the information contained in the court reporter's records or to transcribe any of the information, except that McLendon or an attorney employed by him would be permitted to take shorthand notations.

(3) No equipment would be made available for use by McLendon or his attorney and no equipment would be permitted save and except a note pad and pencil.

(4) The inspection of the records would occur only in the presence of the official court reporter or an alternate certified shorthand reporter to be selected by the judge. In the latter event, the certified shorthand reporter would not be permitted to take any notes.

(5) The official court reporter would not be required to furnish any materials translated into usable form such as a computer print-out of any shorthand notes or other data stored by electronic means in a computer storage system.

The extraordinary restrictions imposed by the trial court were calculated to prevent adequate and reasonable discovery of the original

audio tapes and stenographic notes of the proceedings. These same factual developments may also be found at Supp. T. 50 in McLendon's Motion for Continuance. The continuance was sough due to McLendon's ill health and inability to conduct the investigation personally and his inability to locate counsel who would be able to conduct the investigation on such short notice.

A hearing was thus conducted on September 20, 1988. In an order signed on the same date, the trial court concluded that all of the facts and allegations contained in McLendon's motion to direct the court reporter to prepare a new statement of facts were groundless and that the statement of facts properly reflected the events as they occurred on July 13, 1987, July 14, 1987 and August 20, 1987. The court further concluded that the motion was

filed for the purposes of delay and harassment only. He then assessed an additional judgment again McLendon. The order contains the following specific language:

> "The Court does hereby grant the Plaintiff, CHARLES B. PETTEY, an additional Judgment against the Defendant, RICHARD THOMAS McLENDON, in the sum of SEVEN HUNDRED FIFTY AND NO/100 DOLLARS, ($750.00). Said Judgment shall bear interest at the rate of TEN PERCENT (10%) per annum from this date.
>
> In the alternative, the court does hereby tax the said SEVEN HUNDRED FIFTY AND NO/100 DOLLARS ($750.00) Attorney's fee of R. W. (RICKY) RICHARDS as costs. All costs of Court incurred in this action in regard to this Motion to Direct the Court Reporter to prepare a new Statement of Facts are hereby taxed against the Defendant, RICHARD THOMAS McLENDON, for which let execution issue." (Supp. T. 95 at 96-97; emphasis added)

It is significant to note that Pettey has offered no plausible theory upon which entry of the order may be upheld. Instead, Pettey proposes that the additional judgment is moot because

he has not attempted to collect it. The argument is immaterial to the issue. Incidentally, Pettey has misstated the amount of the additional judgment as $500.00; as shown above, it was for a somewhat larger amount.

It must be noted that McLendon did not request a hearing pursuant to Rule 55(a), T.R.A.P. Rather, he requested that the court of appeals direct the court report to prepare a new statement of facts, under the relevant rules authorizing the court of appeals to take such an action when the statement of facts has not been prepared in compliance with the rules. When Pettey disputed McLendon's allegations, which were substantiated by affidavit and by a considerable body of internal evidence found in the statement of facts itself, the court of appeals referred the matter back to the trial court under Rule 55(a),

T.R.A.P. The order issued by the court of appeals required the trial court to conduct a hearing and to settle the dispute, and, more importantly, to make the statement of facts conform to what occurred in the trial court. This Judge Hassell did not do. The court of appeals may have been bounded by Judge Hassell's findings were it not for the indisputable fact that the trial court's order of September 20, 1988, which purports to validate the falsified statement of facts and which also assesses an "additional judgment" against McLendon, is wholly void on its face, as a matter of law, under Rule 329b(e), T.R.C.P.

Pettey argues that "each and every" allegation made by McLendon concerning the falsification of the statement of facts was proven to be false and that the proof consisted of playing tape recordings during the hearing. However,

substantial allegations were made that certain portions of the testimony had been deleted and that other portions were arranged in an incorrect order. Thus the play of selected portions of the tape recordings cannot feasibly establish that those portions of the original proceedings which were omitted from the statement of facts never happened, or that testimony displaced from one part of the record to another is now in its proper place and in the sequence of time presented, or that the altered or substituted and rearranged exhibits now found in the statement of facts are both authentic and in the original order in which they were presented at trial.

Pettey asserts that the order of September 20, 1988, was a separate appealable order that has now become final. Such a claim is a gross misstatement of the facts. At best, any

attempt to appeal the trial court's second judgment in this case could have only established its voidness.

After the entry of the September 20, 1988 order, McLendon filed various motions to vacate and set aside the order and ultimately, a petition for write of mandamus in the court of appeals. Pettey has construed the action of the court of appeals as one which denied the application for write of mandamus on the merits. Such is not the case. The court of appeals merely denied the request for leave to file the petition on the grounds that McLendon had an adequate remedy by way of the appeal of the case in chief which was then pending in the court of appeals. The allegations urged in the petition for write of mandamus were thus merged into the appeal on the merits as a direct result of the appellate court's ruling. The court refused to permit an

amended brief addressing the issues, and the original opinion as issued by the court failed to address the issue of the September 20, 1988 order. In his motion for rehearing before the court of appeals, McLendon reminded the court that mandamus had been denied on the basis that he had an adequate remedy by way of appeal, but that the court had failed to address the issue in any manner whatsoever. The subsequent opinion likewise fails to address the matter of the trial court's void order. Therefore, it is completely within the realm of this Court's jurisdiction to consider the errors of the court of appeals pertaining to the mandamus action as the issues were merged into the appeal on the merits by the court of appeals' own ruling.

B. Judge Hassell Erroneously Presided Over the Hearing of September 20, 1988

McLendon contends that the order of September 20, 1988 is void on yet another jurisdictional basis; the disqualification of the trial judge by reason of his personal interest in the matter of controversy. Undoubtedly, the reputation and political future of Judge Hassell were at stake.

The basis for disqualification of a judge is contained in Article V, Section 11 of the Texas Constitution which provides in part:

> "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case."
>
> Canon 3(C)(1) of the Code of Judicial Conduct states:
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including, but not limited to, instances where:

(a) He has a personal bias or prejudice concerning a party, **or personal knowledge of disputed evidentiary facts concerning the proceeding**;

The 1988 amendments to the Rules of Civil Procedure, effective January 1, 1988, add Rule 18b, which tracks the language of Canon 3(C) with the exception that the permissive language is made mandatory:

> Rule 18b Grounds for Disqualification and Recusal of Judges.
>
> (2) Recusal
>
> Judges **shall** recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, **or personal knowledge of disputed evidentiary facts concerning the proceeding**.

The constitutional provision respecting disqualification has long been held to make any discretionary order rendered by a constitutionally

disqualified judge "absolutely void" and "a nullity". Buckholts Independent School District v. Glaser, 632 S.W.2d 146, 148 (Tex. 1982); Fry v. Tucker, 146 Tex. 18, 202 S.W.2d 218, 221 (1947); Templeton v. Giddings, 12 S.W. 851 (Tex. 1889).

Disregard of the constitutional disqualification is error that can be raised at any point in the proceeding. Nalle v. City of Austin, 85 Tex. 520, 22 S.W. 960 (1893), 1 R. McDONALD, TEXAS CIVIL PRACTICE §1.24 (rev. 1981).

Concerning a secondary disqualification under Rule 18b, T.R.C.P., McLendon does not contend that Judge Hassell was disqualified merely because he had first-hand knowledge of the original proceedings before the court, but rather because he had first-hand knowledge of the falsification of the statement of facts. As a result, the

judge had his own personal interests to protect. McLendon had no concrete evidence that Judge Hassell had any prior knowledge that the statement of facts had been falsified until September 20, 1988, when the judge signed a fraudulent certification of the falsified statement of facts.

Both the Canons of Judicial Conduct and Rule 18b, T.R.C.P. indicate a judge shall not preside when he has personal knowledge of disputed evidentiary facts concerning the proceedings. The very purpose of the hearing on September 20, 1988 was to resolve evidentiary disputes concerning the statement the facts, in which the personal interest, involvement and complicity of the trial court were at issue. This court has defined the interest which disqualifies a judge as that interest, however small, which rests upon a direct pecuniary or personal

interest in the result of the case presented to the judge or court. Cameron v. Greenhill, 582 S.W.2d 775 (Tex. 1979); Sun Oil Company v. Whitaker, 483 S.W.2d 808 (Tex. 1972). Judge Hassell should not have presided over the hearing inasmuch as he had a distinct personal interest in ensuring that the falsifications of the statement of facts did not come to light and that his involvement in the process would not be discovered.

As a result of the trial judge's constitutional disqualification, the order is wholly void.

C. Order Void for Lack of Statutory Authority

1. Order Wholly Void Under 329b, T.R.C.P.

The very language of the trial court's order of September 20, 1988 indicates that it was an "additional judgment" against McLendon. The term

"additional" can only refer to the monetary judgment which was entered against McLendon an in favor of Pettey on August 20, 1987. Yet the trial court had no jurisdiction or authority to make any additional orders or enter any additional judgment after the expiration of plenary power. Rule 329b, T.R.C.P. clearly provides when a trial court loses its plenary power:

> **Rule 329b. Time for Filing Motions**
>
> (d) The trial court, regardless of whether an appeals has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.
>
> (e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

The Dallas Court of Appeals noted the mandatory nature of the language in Belz v. Belz, 638 S.W.2d 158 (Tex.Civ.App. - Dallas 1982, writ ref'd n.r.e.):

> "Tex. R. Civ. P. 329b provides that the trial court may grant a new trial, or vacate, modify, correct or reform the judgment within thirty days after the judgment is signed. Once the thirty days has expired, however, the judgment becomes final and the trial court loses jurisdiction over the case and may not change or modify the judgment. Sanchez v. Sanchez, 609 S.W.2d 307, 308 (Tex.Civ.App. - El Paso 1980, no writ); Eubanks v. Hand, 578 S.W.2d 515 (Tex.Civ.App. - Corpus Christi 1979, writ ref'd n.r.e.); Ex Parte Trick, 576 S.W.2d 437, 439 (Tex.Civ.App. - San Antonio 1978, no writ)." Id. at 159.

See also, Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983); Smith v. Bidwell, 619 S.W.2d 445 (Tex.Civ.App. - Corpus Christi 1981, writ ref'd n.r.e.).

In the instant cause, a timely motion for new trial was filed on September 18, 1987 and was overruled by

operation of law on November 3, 1987. The trial court's plenary power expired on December 3, 1987. The "additional judgment" was not awarded until September 20, 1988, more than nine months later. The second judgment is clearly void. See Estes v. Carlton, 708 S.W.2d 594 (Tex.App. - Fort Worth 1986, writ ref'd n.r.e.) where two purported judgments had been signed. The court concluded that because the second judgment was signed over 30 days after the first judgment, the second had been signed when the trial court no longer had plenary power and accordingly, it was of no effect.

Accordingly, the order in the instant cause is wholly void on its face as a matter of law. The trial judge's fundamental error in signing the additional judgment and his subsequent erroneous abuses of discretion in refusing to vacate it have been severely injurious to McLendon's case on appeal.

2. No Statutory Authority

Additionally, and without waiving any claim that the order of September 20, 1988 is wholly void under Rule 329b, T.R.C.P., McLendon would show that the order cannot be substantiated on the basis of any other statutory authority. The hearing conducted on September 20, 1988 was held as a result of an order issued by the court of appeals on August 31, 1988. The sole authority for the hearing was enunciated by the Court's order, i.e., Rule 55(a), T.R.A.P. A review of the rule indicates no authority whatsoever either for the court of appeals or the trial court to award attorney's fees in such a proceeding.

Furthermore, a motion to direct the court reporter to prepare a new statement of facts was filed originally in the court of appeals, not in the trial court, and it most certainly is not within the

province of the trial court to determine that a motion directed to the attention of the court of appeals was frivolous or filed for the purposes of delay and harassment.

It is a logical presumption that the award was requested by Pettey's counsel and permitted by the trial court to lend credence to Pettey's request in the court of appeals that Rule 84 damages be imposed. The court of appeals declined to grant those damages. In any event, such an award would be unjustified and totally improper. In Campagna v. Lisotta, 730 S.W.2d 382 (Tex.App. - Dallas 1987, n.w.h.), the appellate court concluded that Rule 84 does not authorize the award of attorney's fees.

D. Order Permits Double Recovery

Special Issue Number 7 submitted to the jury permitted consideration of attorney's fees in arriving at a sum of

money to compensate Pettey for exemplary damages. The jury returned a verdict on that issue in the sum of $5,000.00. Thus, Pettey's attorney was compensated under the original judgment for attorney's fees. The later "additional judgment", which included the award of an attorney's fee, permits double recovery.

X. POINT OF ERROR NUMBER TWO

THE COURT OF APPEALS ERRED IN NOT PERMITTING AN ADEQUATE PRESENTATION OF THE MERITS OF THE APPEAL.

(Germane to the Court's Overruling Without Opinion the Motion to Set Aside the September 20, 1988 Order and the Motion to Rescind Court of Appeals Orders dated October 20, 1988 and November 17, 1988).

The record clearly demonstrates the intensive efforts made by McLendon to obtain an accurate statement of facts which would enable an accurate and adequate presentation of this case on appeal. Subsequent to the trial court's entry of the September 20, 1988 order,

McLendon filed in the trial court a motion to vacate the void order. In the court of appeals he filed a motion for leave to file petition for writ of mandamus, which was overruled. He likewise filed in the court of appeals a motion to set aside the September 20, 1988 order, followed by a motion requesting that court to rescind its orders overruling his earlier motion to direct the court reporter to prepare a new statement of facts and his motion for leave to file an amended or supplemental brief. The mandamus proceeding resulted in a per curiam opinion concluding there was an adequate remedy by way of appeal. No statement as to the merits of McLendon's claim was made. The two motions filed subsequent to the ancillary mandamus proceeding were overruled without opinion. A specific point of error concerning the court's failure to

rule upon or to address the issue was included in the Motion for Rehearing. Again, in its supplemental opinion, the court of appeals simply refused to address the issue.

The court of appeals also failed to acknowledge in its opinion of February 23, 1989, or in its supplemental opinion of May 12, 1989, McLendon's contention that he has been unable to present his case on appeal due to a falsified and inaccurate statement of facts or his diligent efforts to procure an accurate record.

Despite McLendon's claims as to the inaccuracies in the record and his inability to properly present his point of error on appeal, the lower court in its opinion has overruled four of those points of error for the specific reason that error was not preserved because no objection was made at trial. McLendon's

challenge to the statement of facts goes directly to the heart of its contents and whether it accurately reflects the objections made at trial and the rulings of the court thereon. Assuming McLendon is correct in his complaints as to the inaccuracies in the record, he has no means by which to present his claims on appeal. The trial court's order of September 20, 1988 which validated the statement of facts is wholly void on its face as noted in Point of Error Number One. Because the court of appeals refused to address this fact, that court has erred in preventing McLendon from making an adequate presentation of his appeal. Rule 90(a), T.R.A.P. specifically requires that a court of appeals address every substantial issue raised and necessary to final disposition of the appeal. Whether the statement of facts has been falsified goes to the very

foundation of the appeal and a just resolution of the issue is absolutely necessary to a final disposition of the appeal.

The orders of the court of appeals which were predicated upon the trial court's void order are likewise void. The failure of the court of appeals to address this issue must also be considered.

The court of appeals has thus additionally erred in refusing to address these issues, either in the opinion of February 23, 1989 or in the opinion of May 12, 1989, in violation of Rule 90(a), T.R.A.P.

As a direct result of the status of the record, McLendon was able to raise only those points of error which pertain directly to documents contained within the transcript, such as the charge to the jury, errors contained in the special

issues, questions as to jury misconduct, errors in the entry of the judgment based on answers to McLendon's special issues and the propriety of the permanent injunction which was ultimately entered. McLendon was effectively precluded from raising or substantiating any issues as to legal or factual insufficiency of the evidence because of the materially altered statement of facts, even though issues pertaining to insufficiency of the evidence were preserved in McLendon's Motion for New Trial. (T. 87). The critical problem presented is that where an appellant has a falsified statement of facts, the Court can do only one of two things: ensure an accurate record is presented or remand for another trial. The difficulty is further compounded by the fact that without an accurate and complete statement of facts, McLendon cannot fully establish the existence of

perjured testimony with regard to both judgments of the trial court, an allegation duly made in the trial court. The overwhelming result has been a complete chilling of McLendon's right to appeal and a severe limiting of his ability to accurately state his claims on the merits.

Several appellate decisions have recognized the fact that a complete and accurate statement of facts is essential to proper appellate review. In O'Neal v. County of San Saba, 594 S.W.2d 185 (Tex.Civ.App. - Austin 1985, writ ref'd n.r.e.), the court held:

> "An appellant who is unable to obtain a proper record of the evidence is entitled to a new trial where his right to have the cause reviewed on appeal cannot be preserved in any other way . . . If an appellant has observed the rules so as to be entitled to a statement of facts, he has the right to receive no less than a complete statement of facts. Ramon v. Chavira, 586 S.W.2d 594 (Tex.Civ.App. 1977, no writ)." Id at 186.

The Corpus Christi court of appeals came to the same conclusion in Garcia v. Kelly, 565 S.W.2d 112 (Tex.Civ.App. - Corpus Christi 1978, n.w.h.):

> "If an appellant exercises due diligence and through no fault of his own is unable to obtain a proper record of the evidence, a new trial should be granted in order to preserve his right to review." Id. at 113.

See also, Wolters v. Wright, (623 S.W.2d 301 (Tex. 1981); Hawkins v. Hawkins, 626 S.W.2d 332 (Tex.Civ.App. - Tyler 1981, n.w.h.); Gipson v. Southwest Oil Co. of San Antonio, 604 S.W.2d 396 (Tex.Civ.App. - Tyler 1980, n.w.h.).

In considering the gravity of the allegations contained in this second point of error, McLendon would again draw the Court's attention to certain inescapable discrepancies in the existing statement of facts. Appended to the Application for Writ of Error is an affidavit signed by Gordon David

McLendon, son of the Petitioner herein, and an analytical report by the same individual. These documents are indeed lengthy and detailed but they contain irrefutable substantiation of the contention that the statement of facts was falsified. The application contained a brief synopsis of the contents of the report to highlight the extent of the falsification. Included were numerous references to the Exhibit Index which indicated that a total of twenty exhibits were introduced during the trial. The page references in the Exhibit are totally correct as to only six of the exhibits. The remaining fourteen were partially or completely incorrect in some capacity. In and of itself, this raises suspicion. Exhibits tendered by Pettey were "switched", as is evident from a careful review of the exhibits in their respective contexts, as well as the

comments of both attorneys and the evidence elicited with regard to each exhibit. Furthermore, portions of the trial record which reflect discussions as to the admissibility of exhibits and the objections made by McLendon's counsel simply were deleted. Other exhibits were rearranged in order to permit inclusion of an exhibit which was not properly introduced into evidence during trial - i.e., the picture of Pettey's back, presently labeled Exhibit 9. This photograph was inserted after the fact in an attempt to lend credence, however, weak, to Pettey's claim of "serious personal injuries" (i.e., from gunshot wounds). It no doubt reflects the belief expressed by Pettey's attorney that "some type of physical injury or physical manifestation" is a necessary prerequisite to a recovery of damages for "mental anguish". (S.F. 197-198).

The numerous discrepancies or apparent errors in page references in the Exhibit Index serve to pinpoint the location in the statement of facts where particular exhibits were originally marked, offered and admitted. At the same time, these discrepancies in pagination make it possible to trace, with utmost precision, certain alterations which were subsequently made in the statement of facts. Other discrepancies in the evidence indicate that the order of witnesses has been rearranged in the statement of facts.

Unfortunately, what the existing statement of facts cannot affirmatively show is the testimony which was deleted from the record. A thorough review of the affidavit by Gordon David McLendon is essential to an understanding of the nature of these allegations. The statement of facts likewise cannot

indicate the underlying reasons for the manipulation of the record in a case involving what appears to be a modest sum of damages. Yet a portion of the motivation can be observed in the record through the political overtones of the trial. The City's involvement in the condemnation proceedings to take a portion of McLendon's homestead cannot be ignored. Pettey's primary concern, initially, in seeking a permanent injunction, was not to prevent McLendon from causing physical injury to Pettey or his family, but rather to gain political leverage to persuade the City to initiate condemnation proceedings. Whatever the outcome of this case, Pettey's efforts to have a portion of McLendon's private property expropriated, for his own personal benefit, have been successful.

The motivations of other persons involved do not so readily appear.

Nevertheless, the ultimate effect of the manipulation of the record has been a systematic denial of McLendon's rights and the prevention of adequate judicial review of his case on appeal. Deletion of testimony affects McLendon's ability to challenge the sufficiency of the evidence. Deletion of objections affects his ability to challenge evidentiary rulings. Errors committed by the court of appeals have compounded and intensified the errors of the trial court, thereby producing incalculable harm. Reversal is mandated.

XI. POINT OF ERROR NUMBER THREE

THE COURT OF APPEALS ERRED IN OVERRULING THE MOTIONS TO RECUSE CHIEF JUSTICE SUMMERS.

(Germane to Court of Appeals Order Dated December 8, 1988 Overruling Recusal as to Appeal and Order Dated January 12, 1989, Dismissing Motion for Recusal Pertaining to Mandamus as Moot).

McLendon alleged in his Motions to Recuse that such a close, personal

friendship existed between Chief Justice Summers and Judge Morris Hassell that the impartiality of the Chief Justice might reasonably be questioned due to the nature of the charges and allegations raised against Judge Hassell. The conflict arises, not from the personal friendship between Justice Summers and Judge Hassell per se, but from the fact that Judge Hassell had placed himself in direct adversarial alignment against McLendon. The trial judge stood accused of grave offenses with regard to the falsification of the statement of facts and the subsequent cover-up instituted in the trial court. It is difficult to comprehend why the court of appeals chose to overlook an order wholly void on its face rather than address the merits of McLendon's legitimate complaints and set the void order aside. Unless the personal bias and prejudice of Chief Justice

Summers is taken into account, it is beyond comprehension that the court would conclude McLendon had an adequate remedy by appeal on the merits, and then totally fail to address the relevant issues in either of its opinions. In effect, the entire distasteful scenario was simply swept under the rug. Thus, the improper activities of the trial judge and other individuals involved were shielded from public scrutiny. The "sweeping" away of the debris was calculated to result in the complete inability of McLendon to adequately present his case on appeal.

While Rule 15a, T.R.A.P. does not contain the exact language of Rule 18b, T.R.C.P., it can hardly be argued that the conditions of recusal would be substantially different for an appellate justice than for a district judge.

Texas courts have held that the grounds for recusal of a judge go beyond

the grounds for disqualification enumerated in the constitution. The adoption by the Texas Supreme Court of the Code of Judicial Conduct establishes the rule that a judge is without power to act for broader reasons than existed below. Chilicote Land Co., et al v. Houston Citizens Bank & Trust Co., 525 S.W.2d 941, 943 (Tex.Civ.App. - El Paso 1975, no writ). The new Code of Judicial Conduct, which is regarded as construing existing Texas law, appears to extend the grounds for recusal of judges. Neal v. Brim, 506 F.2d 6, 10 (5th Cir. 1975). Under the Code, the subject of a disqualification or recusal has been broadened. Shapley v. Texas Department of Human Resources, 581 S.W.2d 210, 253 (Tex.Civ.App. - El Paso 1979, no writ). A judge should now disqualify (recuse) himself in cases where his impartiality might reasonably be questioned.

Under the new Rule 18b, T.R.C.P., the recusal of a trial judge is mandatory so as to avoid even the appearance of impropriety. While Rule 15a, T.R.A.P. offers more discretion to an appellate justice, the rule nevertheless stresses that a justice should recuse himself in situations where his impartiality might reasonably be questioned. Based upon the serious allegations made concerning the conduct of the trial judge and based upon the close personal friendship between the trial judge and Justice Summers, impartiality was reasonably questioned. As a result, the recusal should have been granted. Denial of the motion to recuse was an erroneous abuse of discretion which, gauged by any measure, has been injurious to McLendon's cause.

XII. POINT OF ERROR NUMBER FOUR

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE LIABILITY ASPECT OF THE JUDGMENT FOR PETTEY IS SUPPORTED BY THE JURY'S FINDINGS.

(Germane to Court of Appeals
Opinion, Page 6)
(T. 46-50)

In the original brief to the court of appeals, error was raised concerning the special issues as to liability and proximate cause. That court has concluded that liability was established by the jury's responses to Special Issue Number 1 (which inquired whether McLendon "did shoot" Pettey), Special issue Number 4 (which inquired whether McLendon was grossly negligent) and Special Issue Number 5 (which inquired whether the gross negligence was the proximate cause of the occurrence). McLendon submits that the court has misconstrued precisely what answers were given.

Special Issue Number One inquired:

> DO YOU FIND THAT ON THE OCCASION IN QUESTION, THE DEFENDANT, RICHARD THOMAS McLENDON, DID SHOOT CHARLES B. PETTEY?

Special Issue Number Two inquired:

DO YOU FIND THAT THE SHOOTING OF CHARLES B. PETTEY BY RICHARD THOMAS McLENDON PROXIMATELY CAUSED ANY INJURY TO THE PLAINTIFF?

Special Issue Number Three inquired:

DO YOU FIND THAT ON OR ABOUT FEBRUARY 25, 1986, THE DEFENDANT COMMITTED AN ASSAULT UPON CHARLES B. PETTEY?

The term "assault" was defined as:

"The term 'assault' as used in this charge is defined as intentionally, knowingly, or recklessly causing bodily injury to another."

Special issue Number Four inquired:

DO YOU FIND THAT THE DEFENDANT WAS GROSSLY NEGLIGENT ON THE OCCASION IN QUESTION?

And Special Issue Number Five inquired:

DID THE SAID GROSS NEGLIGENCE OF THE DEFENDANT PROXIMATELY CAUSE THE OCCURRENCE IN QUESTION?

Liability cannot be established on the basis of the jury's answers to these special issues.

The trial pleadings of Pettey sought recovery for an intentional tort of

assault or for a negligence action based on gross negligence. Neither cause of action is established by the jury's findings. While the jury found that McLendon had "shot" Pettey, there was no determination made that Mclendon intended to shoot Pettey, nor is there a specific finding that he intended to assault Pettey. A requested special issue inquiring as to whether McLendon fired the shotgun for the purpose of intentionally and willfully injuring Charles B. Pettey was denied by the Court (T. 38). mcLendon's trial counsel further objected to the definition of assault (S.F.227). The jury could have found the assault to be merely reckless. The distinction is important because there is a difference between shooting the gun, shooting at Pettey and shooting Pettey. McLendon readily admitted discharging the shotgun. The question

was whether he fired a warning shot with no intention of harming Pettey, which was McLendon's consistent testimony. (S.F. 172). Thus, phrasing Special Issue Number 1 in terms of whether McLendon "shot" Pettey was not the true issue. The issue was whether McLendon "intended" to injure Pettey. The jury was not asked that question, although the issue was duly requested. The intentional tort theory of recovery cannot be substantiated on the basis of the jury verdict.

Pettey also sought recovery on the basis of gross negligence. This theory required a finding that although McLendon may not have intended to injure Pettey, his conduct in discharging the gun was nevertheless grossly negligent. Yet the verdict merely finds McLendon was grossly negligent on the occasion in question. It does not establish the shooting as

gross negligence, nor is there a finding that any injury proximately resulted from the gross negligence. The special issue inquired as to whether the gross negligence of Mclendon proximately cause the occurrence in question. Neither theory of recovery is supported by the verdict.

In a rather cavalier comment in his Response, Pettey's counsel claims that he has no recollection of a requested special issue inquiring as to whether McLendon fired the shotgun for the purpose of intentionally and willfully injuring Pettey as was stated by McLendon in the Application for Writ of Error. He readily admits that he does not have in his possession that portion of the record, but proceeds to cast aspersion as to the credibility of McLendon anyway. A review of page 37 of the Transcript shows a document entitled "Defendant's Request

for Special issues." On page 38, there appears the following:

> Requested Special Issue No. 4:
>
> Do you find that the firing of the shotgun by RICHARD THOMAS McLENDON was for the purpose of intentionally and willfully injuring CHARLES B. PETTEY?
>
> ANSWER:
>
> _____
> "Yes" or "No"

Thus, despite counsel's failed recollection, the requested issue appears in the record, as does the objection to the definition of assault. (S.F. 227). While this Court has taken an approach favoring broad form submission, such an approach does not justify imposition of damages without a finding of liability. Pettey has completely failed to address the fact that the issues, as submitted, fail to establish liability on either cause of action which was properly pled.

It is of further significance that the jury determined that the occurrence took place on McLendon's property, that Pettey was a willful trespasser, and that McLendon had suffered mental anguish as a result. Pettey's pleadings virtually admit his act of trespass in that he limited his claims to intentional tort and gross negligence. An individual merely owes a legal duty to a trespasser not to injure him wilfully, wantonly or through gross negligence. Burton Construction & Shipbuilding Co. v. Broussard, 273 S.W.2d 598 (Tex. 1954); Rowland v. City of Corpus Christi, 620 S.W.2d 930 (Tex.Civ.App. - Corpus Christi 1981, writ ref'd n.r.e.). Had the incident occurred on Pettey's property as alleged, allegations of simple negligence would have likewise been raised to recovery actual damages, although exemplary damages would not have been recoverable on the basis of that theory.

Because liability is not determined by the jury verdict, the judgment of the trial court must be reversed.

XIII. POINT OF ERROR NUMBER FIVE

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE MOTION FOR MISTRIAL ON THE BASIS OF JURY MISCONDUCT.

(Germane to Court of Appeals Opinion, Page 11). (T. 89, S.F. [Hearing August 20, 1987] 6-8)

The affidavit filed by Venice M. McLendon set forth specific allegations of jury misconduct arising from a conversation held in the ladies' restroom between Pettey's wife and a female juror. It is significant to note that Mrs. McLendon's testimony was never refuted or challenged in any capacity. At the hearing during which evidence of the misconduct was taken, counsel for Pettey chose not to cross-examine Mrs. McLendon. And although Mrs. Pettey was present in the courtroom at the hearing, she never

testified to challenge or contradict the fact that the exchange took place. Her silence implicitly verifies Mrs. McLendon's testimony. Thus, there is absolutely unrefuted testimony as to the issue of jury misconduct. Because the entire conversation between Mrs. Pettey and the juror could not be overhead, it is impossible to determine the full nature of the communication. It is known that a statement was made as to the jury's belief in the Pettey's position.

Rule 327, T.R.C.P. provides for a new trial if misconduct of the jury is proven and it reasonably appears from the evidence and from the record of the trial that injury probably resulted to the complaining party. The question of whether or not juror misconduct has occurred is a question of fact, but the issue of whether injury probably resulted from that misconduct is a question of law

to be determined by the appellate court. Texas General Indemnity Company v. Watson, 656 S.W.2d 612 (Tex.App. - Fort Worth 1983, writ ref'd n.r.e.); Reese vs. Brittain, 570, S.W.2d 528 (Tex.Civ.App. - Amarillo 1978, writ re'f n.r.e.). In determining probable harm or injury, the court may consider the nature of the conduct, the significance of the conduct and the present or absence of a rebuff. Reese, supra.

This Court has stated that it cannot disregard positive uncontradicted and unimpeached testimony concerning misconduct such that a finding of material misconduct must be made. Strange v. Treasure City, 608 S.W.2d 604 (Tex. 1980). The affidavit and testimony of Venice McLendon herein was positive and unrefuted. An implied finding by the trial court that no overt misconduct occurred is not binding on a reviewing

court if all of the controverted evidence shows that the misconduct in fact occurred. Naranjo v. Cull, 569 S.W.2d 529 (Tex.Civ.App. - Corpus Christi 1978, writ ref'd n.r.e.). The affidavit of Mrs. Pettey attached to the Response to the Application for Writ of Error cannot in retrospect serve as a contradiction. It is wholly outside the record and an improper effort to supplement the record. Under the rationale of Strange, the next question is whether injury resulted from the misconduct.

In some instances, an overt act of misconduct may in and of itself be so prejudicial as to establish injury. In Harker v. Coastal Engineering, Inc. 672 S.W.2d 517 (Tex. App. - Corpus Christi 1984, writ ref'd n.r.e.), the court noted that a communication to a juror may result in misconduct if it is deemed material and it appears that injury

probably resulted. It must be noted here that there was no rebuff of the communication between Mrs. Pettey and the juror. The communication continued in spite of Mrs. McLendon's presence. This Court's ruling in Texas Employer's Ins. Ass'n. v. McCaslin, 317 S.W.2d 916 (Tex. 1958) is keenly analogous to the instant cause. In McCaslin, the plaintiff engaged a juror in conversation in an attempt to influence the juror's actions. In reviewing the case, the Court commented that there is no requirement that the party asserting error must show injury beyond a reasonable probability in order to secure a reversal of the judgment. Further, in estimating the probability of injury, the court concluded that the act of overt misconduct in itself may be the most compelling factor in establishing prejudice. The Court continued:

"When a juror has been subjected to an improper influence, such as that disclosed by the present record, it is difficult and often impossible for that juror to maintain an impartial attitude as between the litigating parties. And this is true whether the juror is prejudiced in favor of or against the party guilty of the improper act. In any event the trial cannot thereafter proceed to a fair and impartial jury as contemplated by Article 1, § 15 of our Constitution.

. . . The burden of the complaining party is met by showing that the trial which resulted in a judgment against him was materially unfair. Rule 327 does not preclude the drawing of logical inferences of prejudice and unfairness from the overt act itself for an action or occurrence may be so highly prejudicial and inimical to fairness of trial **that the burden of going forward with proof of harm is met, prima facie at least, by simply showing the improper act and nothing more.**

. . . The inference of unfairness and prejudice attending it is so strong that it could hardly be rebutted except by a showing that plaintiff was entitled to judgment as a matter of law.

. . . We hold as matter of law that probable prejudice to the petitioner was shown under Rules 327 and 503."

In the instant case, the jury returned a verdict finding that Pettey had been shot, although his own medical evidence not only failed to substantiate his claim that shot pellets had lodged in his body, but actually disproves such a claim. Thus, the conversation concerning the juror's belief in Pettey's position and the continued conversation which could not be heard unquestionably resulted in a verdict which led to judgment against McLendon for both actual and punitive damages. There can be no doubt that the conversation which took place concerned the facts of the lawsuit. The juror was heard as saying "Most of us on the jury believe you, and I told them...". When one notes that Mrs. Pettey quieted the juror so that the conversation could not be heard by Mrs. McLendon, it becomes obvious that there was no intention to cease the communication.

Misconduct in the instant cause has been established by unrefuted testimony. Materiality is unquestioned. The deliberate continuation of the communication after discovery was made by Mrs. McLendon indicates such an overt act so as to establish injury.

Pettey further claims that the issue has been waived because it was not properly presented to the trial court. Yet he admits that juror misconduct was raised at the hearing on the entry of judgment by virtue of a request for mistrial. It was again raised by virtue of the motion for new trial. Diligence was utilized in attempting to obtain a hearing on the motion for new trial. This Court stated in Hensley v. Salinas, 583 S.W.2d 617 (Tex. 1979) that when a motion for new trial presents a question of fact upon which evidence must be heard, the trial court is obligated to

hear such evidence when the motion for new trial alleges facts, which if true, would entitle the movant to a new trial and when a hearing for such purpose is properly requested. Denial of the motion was error.

XIV. POINT OF ERROR NUMBER SIX

THE COURT OF APPEALS ERRED IN CONCLUDING THAT ALTHOUGH McLENDON HAD PRESERVED ERROR CONCERNING THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE JURY'S CONSIDERATION OF FUTURE PHYSICAL PAIN AND SUFFERING, ERROR WAS HARMLESS.

(Germane to Court of Appeals Opinion, Page 8 and Supplemental Opinion on Rehearing, Page 3)
(T. 51)

When an objection was made to the trial court's submission of issues to the jury and where points of error on appeal properly challenge the legal sufficiency of the evidence to support submission, a question of law is presented which this Court has jurisdiction to consider. Cook v. Hamer, 158 Tex. 164, 309 S.W.2d 54 (1958).

In the original brief to the court of appeals, Point of Error Number Four states:

> The trial court erred in submitting to the jury future physical pain and suffering, and entering judgment on the actual damage verdict, since there was no evidence of future physical pain and suffering.

In overruling this point of error, the first opinion of the court states:

> "Our examination of the record reveals that McLendon made no objection to the submission of the issue, filed no motion to disregard the finding, filed no motion for judgment n.o.v., filed no motion to modify or reform the judgment, nor made any allegation in his motion for new trial that the finding of the jury has no support in the evidence. Hence, the point is not preserved for review and is overruled."

However, a review of the statement of facts indicates that an objection to the issue was in fact made by McLendon's counsel on the basis that there was no evidence to support it. This fact was recognized by the court of appeals in its

supplemental opinion on rehearing. Nevertheless, the court concluded that because Dr. Landrum had testified that Pettey would require institutional psychiatric care for two years at a cost of $12,000, and the jury awarded Pettey actual damages in the sum of only $5,000, any error was harmless.

Actually, Dr. Landrum, who is a psychologist rather than a psychiatrist, testified that he did not predict that Pettey would require institutionalization.

> MR. RICHARDS: Dr. Landrum, you're not telling the Jury here today that you think that tomorrow he may go into an institution, are you?
>
> DR. LANDRUM: I'm not predicting that he will. I'm fearful for his emotional condition.
>
> MR. RICHARDS: If he could continue as he has in the past and stay at home and deal with it, what is your professional opinion as to possible future or let me rephrase that, probably future psychological needs that he may have?

DR. LANDRUM: At this point I would say that he'll likely need periodic psychiatric evaluations for continuation of medication and that he'll need psychological supporters from a psychologist in additional to a psychiatrist evaluating and prescribing medication.

MR. RICHARDS: Based on his age being 80 or so, would you have an opinion as to how much money he would need possibly in the future to set aside for these probable psychological needs? This is excluding institutionalization, just an occasional counseling session?

DR. LANDRUM: Well, just a quick calculation of office visits to a therapy he's probably in the neighborhood of $500.00 a month based on two to five visits of very lengthy visits over a period of, I would say, a minimum of two years. (S.F. 155-156).

Despite Mr. Richards' own corrections from use of the word "possible" to use of the word "probable", Dr. Landrum's testimony never reached the point of an opinion based upon reasonable medical probability. He specifically noted a need for periodic psychiatric evaluation for the continuation of

medication. There was no testimony that Pettey had every seen a psychiatrist. Dr. Landrum himself has an Edd., doctorate degree through the department of education in a department of psychology. (S.F. 160). He is not a medical doctor and cannot prescribe medication. (S.F. 160). Despite his reference to the need for a "continuation of medication", there was no testimony that Pettey had ever been prescribed medication by a psychiatrist. The only medication which Pettey could remember being prescribed was some Valium and that was prescribed by Dr. Chang. (S.F. 89). Exhibit 6 includes a medical bill from May Drug which indicates a one-time purchase of a prescription dated 3/5/86. There was no indication that Pettey was taking the medication at the time of the trial. In fact, he testified that he had recovered emotionally:

MR. RICHARDS: All right. Mr. Pettey, describe whether or not you feel that you have recovered emotionally from the shooting?

MR. PETTEY: Yes, sir, to some extent.

MR. RICHARDS: Do you feel somewhat better now than you did?

MR. PETTEY: Yes, sir. (S.R. 95)

Dr. Landrum additionally testified to a possible need for continued psychological treatment consisting of between two and five visits a month for a period of two years. Yet Landrum also testified that in the 17 months between the date of the "incident" and the date of trial, he had seen Pettey only three times for a total treatment cost of $520.00. Such wide discrepancy between the testimony of "possible" future need and Pettey's actual course of treatment indicates that Dr. Landrum's testimony was based purely on "possibilities" and not "probabilities". The testimony of an

expert medical witness as to an opinion based on reasonable probability constitutes "no evidence" if, in fact, the opinion does no more than suggest a possibility. Schaefer v. Texas Employer's Ins. Ass'n., 612 S.W.2d 199, 204-205 (Tex. 1981). Landrum's testimony offers no more than a possibility of future treatment. The possibility is negated by both Landrum's and Pettey's testimony.

Because there is no competent evidence of psychological bills which Pettey will incur in the future nor of the emotional distress or mental anguish which he will suffer in the future, the error was not harmless. Reversal is accordingly mandated.

XIV. POINT OF ERROR NUMBER SEVEN

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE TRIAL COURT CORRECTLY GRANTED A PERMANENT INJUNCTION AGAINST McLENDON.

(Germane to Court of Appeals Opinion, Page 11).
(T. 82-83)

McLendon challenged in his original brief by way of Points of Error 13 and 14 the action of the trial court in granting a permanent injunction. The injunction is wholly void for noncompliance with the Rules of Civil Procedure. Rules 682, T.R.C.P. specifically requires a pleading requesting an injunction to be verified. Pettey filed an original petition, first amended petition and second amended petition. All three requested injunctive relief. The second amended petition requested the precise injunction which the trial court ultimately entered. Yet not a single one of the petitions contained any verification by Pettey as required by the rules.

Rule 683, T.R.C.P. requires that any order granting an injunction must be specific in its terms and shall set forth

the reasons for its issuance. Provisions of the rule requiring that every order granting an injunction shall set forth the reasons for its issuance are couched in mandatory terms. The order of August 20, 1987 containing the injunction wholly fails to mention any reason for its issuance.

The require of the rules that the order set out specifically the reasons for granting the injunction is mandatory and failure of an order to meet these requirements constitutes reversible error. Holt v. City of San Antonio, 547 S.W.2d 715 (Tex.Civ.App. - San Antonio 1977, writ ref'd n.r.e.); General Homes, Inc. v. Wingate Civic Association, 616 S.W.2d 351 (Tex.Civ.App. - Houston [14th Dist.] 1981, writ ref'd.); University Interscholastic League v. Torres, 616 S.W.2d 355 (Tex.Civ.App. - San Antonio 1981, n.w.h.); Southwestern Bell

Telephone Co. v. Gravitt, 522 S.W.2d 531 (Tex.Civ.App. - San Antonio 1975, n.w.h.).

The order further provides that Pettey has no adequate remedy at law, yet the acts sought to be enjoined are indeed criminal violations for which an adequate remedy at law would exist. A plaintiff seeking an injunction must plead and prove that he is without a legal remedy. Raine v. Searles, 302 S.W.2d 486 (Tex.Civ.App. - El Paso 1957, n.w.h.). This Pettey did not do. The granting of an injunction in the face of adequate legal remedies constitutes an erroneous abuse of discretionary powers. Bagley v. Higginbotham 353 S.W.2d 868 (Tex.Civ.App. - Beaumont 1962, writ ref'd n.r.e.). In fact, Pettey has numerous legal remedies available to him, as the following decisions indicate.

The rule has long been well settled that in the absence of some specific statutory authority, an injunction will not issue to restrain the commission of a criminal act on the part of another where no property rights of the complainant are involved. Suttle v. State, 457 S.W.2d 344 (Tex.Civ.App. - Waco 1970, n.w.h.); Corchine v. Henderson, 70 S.W.2d 766 (Tex.Civ.App. - Dallas 1934, n.w.h.). As the opinion in Hogue v. City of Bowie, 209 S.W.2d 807 (Tex.Civ.App. - Fort Worth 1948, writ ref'd n.r.e.) indicates, "property rights" differ from "property damage". In Hogue, the court concluded that the plaintiff had sustained no substantial damages to his property from the tortious acts of the city and that if he had sustained such damages, he would have had an adequate remedy at law, had he chosen to pursue it. See also, Chapter 215, Associated Master Barbers &

Beauticians v. Brown, 315 S.W.2d 17 (Tex.Civ.App - Fort Worth 1958, writ ref'd n.r.e.).

A review of the petitions filed by Pettey indicate that he was not, at the time of trial, seeking an injunction to prevent any sort of interference with his property rights. The only injunction sought in Plaintiff's Second Amended Original Petition was with regard to personal injury, bodily harm or threats of bodily harm. (T. 32). Such claims are not subject to injunctive relief. In Kostoff v. Harris, 266 S.W.2d 204 (Tex.Civ.App. - Dallas 1954, writ ref'd n.r.e.), the plaintiff and defendant had engaged in a fight on a driveway near the plaintiff's place of employment. During the trial, the testimony of the parties was in sharp conflict and each claimed injuries requiring medical treatment. The trial court entered an injunction

against the defendant. In dissolving the injunction, the court of appeals noted:

> "Further, in the absence of statutory authority, equity will not enjoin the commission of a crime unless property rights are involved . . . And this rule has been held to apply to a mere threatened physical injury, the reason being that the remedies for damages and criminal prosecution are considered adequate." Id. at 206.

Since Pettey had other adequate remedies at law, injunctive relief was not available and issuance of the injunction was improper.

The issuance of an injunction is an equitable remedy requiring the moving party to come before the court with "clean hands". Local Union No. 324, International Brotherhood of Electrical Workers, A.F.L. v. Upshur-Rural E.D. Corp., 261 S.W.2d 484 (Tex.Civ.App., n.w.h.). Thus, it can be said that a court of equity must deny relief to a litigant who is himself guilty of

misconduct in respect to the matters in controversy. 44 Tex.Jur.3d, Injunctions §30 at 424 (1985). Pettey was found by the jury to have been trespassing upon McLendon's property at the time of the incident. His claim is tainted by his own conduct, regardless of the strength of any equitable right he may have had in the absence of such misconduct. In Humphreys-Mexia Co. v Arseneaux, 297 S.W.2d 225 (Tex. 1927), this Court concluded that equity will not adjust the relations between wrongdoers and that the complaining party is first judged. Not until he has been found free from guilt does equity proceed to determine whether he has been wronged. See also Green v. Meadows, 517 S.W.2d 799 (Tex.Civ.App. - Houston [1st Dist.] 1984), rev'd on other grounds, 524 S.W.2d 509 (Tex. 1975) (per curiam).

In temporary injunction cases, the only question for appellate review is whether the trial court abused its discretion in granting or refusing to grant an injunction. Appeals from permanent injunctions are accorded a different character of appellate review. Each case must be reviewed from the standpoint as to whether the action of the trial court was correct. Thus, the court's ruling is subject to challenges of factual and legal sufficiency of the evidence. Electronic Data Systems Corp. v. Powell, 524 S.W.2d 393 (Tex.Civ.App. - Dallas 1975, writ ref'd n.r.e.); Fuentes v. City of Kingsville, 616 S.W.2d 679 (Tex.Civ.App. - Corpus Christi 1981, n.w.h.). In the instant cause, substantive reasons aside, the order of injunction is erroneous because it is not supported by any evidence whatsoever. Neither the findings of the jury or the

findings of the court support its imposition. There is no evidence in the record of any difficulty or problems between McLendon and other members of Pettey's family or that any incidents or threats have ever been made with regard to those family members. Further, there is no evidence to support the fact that McLendon has ever trespassed on the property located at 419 Cherry Street or that any threats have been made concerning future conduct at Pettey's residence.

In an attempt to defend the trial court's improper issuance of the permanent injunction, Pettey states in his Response: "The Petitioner admitted and stated to Officer Mark Johnson, the investigating officer, that he intended to shoot Mr. Pettey again if he got on the disputed piece of property. (S.F., Page 54, Lines 10-13)." Yet a review of

the questions indicate even when viewed in a light most favorable to Pettey, that future confrontation, if any, would arise only if Pettey trespassed on McLendon's property. It is especially significant that whereas Pettey was expressly seeking to establish a basis for injunctive relief and to demonstrate that a necessity existed for the issuance of a permanent injunction, there was no reference anywhere in the statement of facts as to any past or possible future conduct by McLendon at Pettey's home, at 419 Cherry Street. Rather the entire thrust of counsel's line of questioning during the trial was, quite simply, that McLendon might make an effort to defend his own property against continued criminal trespass by Pettey in the future. In fact, the jury specifically found that the altercation in question did not occur at 419 Cherry Street, but

instead occurred on McLendon's property. The court was bound by such findings and as a result was precluded from entering the relief requested. State v. Texas Pet Foods, Inc., 591 S.W.2d 800 (Tex. 1979); Alamo Title Co. v. San Antonio Bar Ass'n., 360 S.W.2d 814 (Tex.Civ.App. - Waco 1962, writ ref'd n.r.e.).

Aside from the pertinent issues raised in the Application for Writ of error, McLendon desires to have the trial court's unwarranted action overruled for a simple, pragmatic reason: In effect, a permanent injunction against "McLendon, his agents, servants and employees" would afford Pettey an unlimited opportunity and a convenient means to wage a perpetual harassment campaign against McLendon, his family, friends and associates. If the lower courts' actions in this matter be sustained, there is a reasonable expectation and probability

that the same court which issued the permanent injunction will henceforth issue a continuing series of citations for presumed contempt of court, on the mere whims of an exceptionally troublesome neighbor who professes himself to be emotionally disturbed and who has demonstrated a flagrant disregard for truth and the rights of other. McLendon prays the Court to strike the permanent injunction from the trial court's order, in addition to or in conjunction with such other and further relief as the Court may grant herein.

PRAYER

Accordingly, McLendon prays that the Court grant rehearing herein and schedule oral argument on all issues presented.

Respectfully submitted,

ANN C. McCLURE
Appellate Counsel for Petitioner
6541 Vasco Way
El Paso, Texas 79912
915/584-6033
State Bar No. 05017800

CERTIFICATE OF SERVICE

I hereby certify that on this the _____ day of October, 1989, a true and correct copy of the above and foregoing Motion for Rehearing was forwarded to counsel for Respondent, Mr. R. W. (Ricky) Richards, Adamson, Phifer & Richards, 516 East Commerce Street, Jacksonville, Texas 75766.

_____

ANN C. McCLURE

IN THE SUPREME COURT OF TEXAS

NO. C-8768 October 4, 1989

RICHARD THOMAS McLENDON
vs.
CHARLES B. PETTEY

FROM CHEROKEE COUNTY, TWELFTH DISTRICT

Application of petitioner for writ of error to the Court of Appeals for the Twelfth District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that application, Richard Thomas McLendon, and surety, Lawyers Surety Corporation, pay all costs incurred on this application.

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NO. C-8768 February 21, 1990

RICHARD THOMAS McLENDON
vs.
CHARLES B. PETTEY

FROM CHEROKEE COUNTY, TWELFTH DISTRICT

Petitioner's motion for rehearing of application for writ of error having duly considered, it is ordered that said motion be, and hereby is, overruled.

****

I, John T. Adams, CLERK of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the Seal of the Supreme Court of Texas, at the City of Austin, this the 22nd day of February, 1990.

JOHN T. ADAMS, CLERK

By_____
Courtland Crocker, Deputy Clrk